Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	
Totality of the Circumstances Test	)	
	)	

To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Nexstar Broadcasting, Inc. ("Nexstar"), the licensee of 68 full-power television stations serving 57 predominantly small and medium markets, respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding for review of the "totality of the circumstances" test for evaluating whether negotiations between multichannel video programming distributors ("MVPDs") and broadcast television stations are being conducted in good faith.[1] Specifically, the NPRM seeks comment on whether there is a need to update the totality of the circumstances test and whether specific practices should be considered evidence of bad faith under the test.[2]

The Commission implemented this review pursuant to Congressional directive.[3] As the Commission undertakes this review it must carefully consider that Congress mandated a review of

[1] *In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109 (Sept. 2, 2015) ("*NPRM*").

[2] *Id.* at ¶6.

[3] *See STELA Reauthorization Act of 2014* ("*STELAR*"), Pub. L. No. 113-200, §103(c), 128 Stat. 259 (2014).

both parties' actions during retransmission consent negotiations, not just broadcast station actions (on which much of the NRPM focuses).[4] Further, the Commission must remember that Congress neither pre-judged the outcome of such review (e.g., it did not instruct the Commission to undertake the review in support of any particular outcome) nor did Congress alter the underlying retransmission consent statute. Therefore, the Commission must conduct this review within the overall context of Congress's underlying and unmodified principals that (i) MVPDs may not retransmit any broadcast station's signal without the express consent of the station and (ii) retransmission consent agreements are private negotiations in which terms and conditions may be based on competitive marketplace considerations.[5]

The Commission also must carefully consider its own precedential decisions in this area. Any significant departure from the Commission's prior findings that the Commission is not intended to sit in judgment or intrude into retransmission negotiations requires "a reasoned analysis for the change."[6] As evidenced by the Commission's review of the complaints filed under the totality of the circumstances test, this test has been adequate to ensure the relevant parties negotiate in good faith and the Commission is fully capable of analyzing complaints using the test as currently defined. For the reasons discussed below, there is no need or reason for the Commission to modify the totality of the circumstances test, nor is there any reason for the Commission to adopt

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[4] *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) ("The Committee intends that the rulemaking . . . should be used to update the FCC's totality of the circumstances test so that the test will take a broad look at all facets of how *both television broadcast station owners and MVPDs* approach retransmission consent negotiations to make sure that the tactics engaged in by *both parties* meet the good faith standard set forth in the Communications Act." emphasis added).

[5] 47 U.S.C. §325(b)(1); 47 U.S.C. §325(b)(3)(C). *See also* S. Rep. No. 92, 102 Cong. 1st Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1169 ("it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations") ("*Senate Report*").

[6] *See e.g., Motor Vehicle Mfrs' Ass'n*, 463 U.S. 29, 42; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

certain practices as *per se* evidence of bad faith under the totality of the circumstances test (or the *per se* test for that matter).

I. THE FLEXIBILITY OF THE TOTALITY OF THE CIRCUMSTANCES TEST MEETS THE COMMISSION'S NEEDS.

In 1999, Congress adopted the requirement prohibiting broadcast stations from failing to negotiate retransmission consent carriage in good faith.[7] The Commission implemented this statutory obligation under a two part test establishing a list of those actions that are so egregious as to be considered a *per se* violation of good faith and a framework for complaints that do not rise to a *per se* violation but that, under the totality of the circumstances, demonstrate a party has failed to negotiate in good faith.[8] In 2004, Congress extended this prohibition to MVPDs, and the Commission made corresponding changes to its rules.[9]

In adopting these regulations, the Commission stated that it would consider whether, under the facts of a particular negotiation, "the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties" but that such review would not "serve as a 'back door' inquiry into the substantive terms negotiated between the parties" and "complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed."[10] And despite the nearly continuous assault by MVPDs on these standards over an extended, multi-year period, the current good faith

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7 *Satellite Home Viewer Improvement Act ("SHVIA")*, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

8 *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*").

9 *See*, *Satellite Home Viewer Extension and Reauthorization Act ("SHVERA")*, Pub. L. No. 108-447, 118 Stat. 2809 (2004); *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339 (2005) ("*Reciprocal Bargaining Order*").

10 *Good Faith Order*, 15 FCC Rcd at 5458.

test has facilitated thousands of retransmission consent agreements, with only one finding of bad faith negotiating actions by the Commission. Accordingly, and despite the Commission's apparent acceptance of MVPD contentions that the retransmission consent marketplace is unfair and the corresponding demands to rebalance the scales in their favor, there is no evidence and no reason to modify the totality of the circumstances test.

A. The Number of Negotiations Completed Each Year Without Impasse Reflect That the Retransmission Consent Marketplace is Working as Intended.

The current retransmission framework is one of the great public policy accomplishments of the last twenty-five years, and it is working the way Congress intended. When Congress adopted Section 325 of the Communications Act it did so to prevent cable operators from appropriating broadcast television signals for their own use without the broadcaster's consent and without compensation. Congress adopted this regulation due to its concern for broadcasters' ability to continue to serve their communities (and to eliminate the broadcaster subsidy of cable operations).[11] In granting broadcasters the right to be compensated for their signals, Congress acknowledged that allowing such fees would "ensure that our system of free broadcasting remain vibrant," providing revenues for broadcaster stations to purchase better quality programming and increase local programming.[12] This is exactly what has occurred – retransmission consent fees have "led to increases in local television news and public affairs programming" and "allowed broadcasters to retain (or regain) rights to programming, especially sports programming, that would not otherwise have been available on free over-the-air television."[13]

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11 *Senate Report* at 1168.

12 *Id.* at 1169.

13 *See* Replies of the National Association of Broadcasters, *Applications of Charter Communications, Inc., Time Warner Cable, Inc. and Advance Newhouse Partnership for Consent Pursuant to Sections 214 and 301(d) of the Communications Act to Transfer Control of Licenses and Authorizations,* MB Docket 15-149, pp. 3-4, fn9 (filed Nov. 12, 2015).

Despite the relatively smooth functioning of the retransmission consent marketplace, since practically the negotiation of the first retransmission consent agreement that included a payment of cash fees, MVPDs have been shouting far and wide that broadcasters are demanding outrageous, consumer-abusing retransmission fees based on the unfair leverage broadcasters have in negotiations. In order to attract as much attention as possible, MVPDs routinely place maximum emphasis on those few times an impasse occurs between a broadcaster and MVPD. However, contrary to MVPD portrayal, the number of actual impasses occurring each year has not increased in recent years.

Prior to 2012, less than one percent (1%) of the nearly 15,000 retransmission consent agreements negotiated ended in an impasse (i.e., 99% of all negotiations ended in a successful agreement).[14] Notwithstanding the continual complaining by MVPDs (and their associated lobbying organizations), that trend remains largely unchanged today. For the three year period from January 2013 through November 2015, the American Television Alliance ("ATVA"), a MVPD lobbying organization comprised of both MVPDs and cable channel providers, states there were 127 blackouts in 2013, 107 in 2014, and 200 in 2015 (as of November 1) or 0.8%, 0.7%, and 1.3%, respectively, of the 15,000 agreements negotiated in the three-year period.[15] Although relatively small numbers themselves, the ATVA vastly overstates the number of actual impasses by a significant margin. For example with respect to the reported 2015 impasses, ATVA counts a dispute between a single broadcaster who operates multiple stations and a single MVPD as multiple impasses rather than one impasse, thereby artificially skewing its reported numbers

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[14] *See* Bachman, Katy, *The Politics of Retrans: Why the fight between cable and TV stations is aimed at Congress*, *Adweek*, July 24, 2012, http://www.adweek.com/news/television/politics-retrans-142148 (last visited Nov. 30, 2015).

[15] ATVA Blackout List 2010-2015 Fact Sheet located at http://www.americantelevisionalliance.org/media-center/ (last visited Nov.30, 2015).

upwards. Looking at the ATVA reported disputes between a single broadcaster and a single MVPD for 2015, the number of impasses is only 28 (not 200) or less than 0.2 percent of all agreements negotiated in the three year period covering 2013-2015.[16] Moreover, the ATVA data does not indicate whether the impasse occurred despite the broadcaster having offered an extension that the MVPD outright rejected.

ATVA also does not identify that thirteen of the 2015 disputes involved DISH Network, seven involved DirecTV, three involved Cable One and two involved Mediacom. In fact, ATVA does not report that two thirds of the impasses since January 1, 2013 have involved just three MVPDs – DISH, DIRECTV, and Time Warner Cable. who have manufactured a "retransmission crisis" to provoke government intervention in private negotiations because broadcasters are gradually seeking retransmission fees that reflect the fair value of their signals.[17] In contrast, 10 of the 13 2015 impasses involving DISH involved small broadcasters with stations operating only in one or two markets (rather than the 210 DISH operates in), and five of the seven DirecTV impasses involved broadcasters with stations operating in only one or two markets.

Moreover, an analysis of these interruptions on an annualized basis reflect that the interruptions affect, on average, 0.01% of the total annual viewing hours of all television households – i.e. an inability by subscribers to receive their first-choice local television station via their chosen MVPD for approximately 20 minutes each year.[18] For purposes of comparison, the

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[16] *Id.* There were only 22 impasses in 2013 (14 of which involved DISH or DirecTV) and only 11 in 2014 (8 of which involved DISH or DirecTV). Perhaps the Commission should open an inquiry into the DISH and DirecTV negotiating tactics since 42 of the 61 impasses involved these two companies.

[17] *See* http://www.tvfreedom.org/retransmission-consent-facts/ (last visited Nov. 30, 2015) (noting that 26 of 38 disputes between 2010 and 2015 have involved DISH, DIRECTV, or Time Warner).

[18] Comments of the National Association of Broadcasters, *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, FCC 11-31, MB Docket No. 10-71 at 8 (filed May 27, 2011) (citing Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 26, 30-31) ("*NAB 2011 Comments*").

average household experiences electricity outages of 381 minutes per year, cable systems strive for service reliability of 99.97%, and the average DBS subscriber experiences non-retransmission consent related service outages between 500 to 1,000 minutes per year.[19]

B. Marketplace Changes Do Not Warrant Commission Intervention.

The Commission posits that significant changes in the retransmission consent marketplace have occurred since Congress enacted retransmission consent, these changes have altered the negotiation dynamics between broadcasters and MVPDs, and that this alteration somehow supports reducing the flexibility of the totality of the circumstances test. In support of this premise the Commission asserts that increased competition among MVPDs place MVPDs at a negotiation disadvantage because if a MVPD does not have a broadcast station it may permanently lose subscribers to its competitors.[20] Yet, for no discernible reason, the Commission simply ignores the opposing axiom that broadcasters are disadvantaged when they do not reach viewers of a MVPD with whom they did not reach a carriage agreement.

The Commission then contends MVPDs are disadvantaged in negotiations with broadcast licensees that are affiliated with other programming networks because those licensees can integrate their negotiations with the carriage of other networks which, in the result of an impasse, could cause the loss of the other networks as well as the broadcast stations.[21] However, MVPDs are no

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[19] *Id.* For example, DirecTV customers experienced technical glitches causing the loss of local broadcast channels twice in early September. *See TVFreedom.org Statement on DirecTV Service Outages*, Sept. 14, 2015, http://www.tvfreedom.org/wp-content/uploads/2015/03/TVF-Press-Release-on-DirecTV-Outages-Week-1-NFL-Games.pdf (last visited Nov. 30, 2015).

[20] *NPRM* at ¶3. That the Commission deems MVPD subscriber loss as sufficient reason to alter the good faith retransmission negotiation obligations is particularly disturbing. Nowhere in the Communications Act is the Commission directed to protect the members of any industry from the consequences of actions by members of that industry. In fact, Nexstar knows of no regulatory agency whose governing statutes direct such agency to protect an industry that it oversees from routine industry activity.

[21] *Id.*

more disadvantaged in negotiations with the small handful of vertically integrated station groups (Disney, NBCU, Fox) than they are in negotiating with the owners of multiple cable channels (e.g. Discovery, Turner Broadcasting System, A&E Networks, Viacom Media Networks) and they certainly are not at a disadvantage with respect to the vast number of broadcast stations that are not vertically integrated with a major programmer.[22] Finally, the Commission proclaims that these marketplace changes are applying pressure on consumer prices for MVPD services, implying that the fees MVPDs charge their subscribers somehow disadvantage MVPDs in negotiations solely with respect to the rights for retransmission of broadcast stations, while simultaneously acknowledging that MVPDs are not likely to reduce subscriber fees in the event they are able to derive savings from broadcast retransmission consent fees.[23]

Notwithstanding the sole instance in which the Commission found a violation of the totality of the circumstances test the violator was a MVPD, nowhere in its stage setting (or anywhere else in this NPRM) does the Commission consider or analyze the retransmission consent negotiation process from a broadcaster's perspective. The Commission does not acknowledge that broadcasters still negotiate in a highly concentrated MVPD market wherein the five largest cable MVPDs account for approximately 81.8% of all cable MVPD subscribers and the top ten cable MVPDs account for 91.5% of all such subscribers.[24] The Commission also does not acknowledge

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[22] Broadcast stations owned by vertically integrated licensees are generally located in the largest of markets which are in turn served by large, sophisticated MVPDs (e.g., Time Warner, Comcast, DISH, DirecTV). Moreover, the Commission should not adopt a prophylactic rule applicable to every local broadcaster simply to regulate the actions of the four large networks.

[23] The Commission apparently assumes that broadcast retransmission fees are the major component of a subscriber's monthly bill, ignoring that these fees comprise less than five percent of the total MVPD programming expenses.

[24] *See* Sixteenth Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 15-41, MB Docket No. 14-16, ¶25 (released April 2, 2015) ("*Sixteenth Report*").

that the combined shares of the two DBS MVPDs (prior to AT&T's acquisition of DirecTV) account for 33.8% of all MVPD subscribers.[25] The Commission ignores that by its own determination the HHI in the MVPD market is 2500 in markets served by four MVPDs (DOJ considers 2500 or to be highly concentrated) increasing to 5000 for markets served by only two MVPDs.[26] Nor does the Commission acknowledge that negotiating with MVPDs is still high stakes for broadcasters in terms of ad sales, local reputation, and community obligation. And finally, the Commission incongruously seems to believe that large sophisticated MVPDs with market caps significantly larger than even the largest local broadcast station group somehow lack negotiating leverage.

While the Commission expounds on the changed MVPD marketplace, it simply ignores that, today, broadcast stations compete with hundreds of television channels, VOD services, and Internet content. It ignores that DVR, OVD, and mobile technology created an on-demand viewing culture that has significantly altered how viewers consume broadcast programming. The Commission ignores that millennials increasingly consume news from social media and broadcast network programming from OTT platforms (such as a network's website, via Hulu and other direct Internet access methods), and that there is a growing audience of "cord nevers."[27] The Commission ignores that ratings for the broadcast networks (which provide the programming foundation underlying broadcast stations' service to their communities) have fallen as viewers have turned to

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[25] *Sixteenth Report* at ¶26. Collectively, the ten largest cable MVPDs and DBS providers (e.g., 12 entities) accounted for 84% of the 100 million MVPD subscribers.

[26] *Id.* at ¶32.

[27] *See* Report of the Media Insight Project, *How Millennials Get News*, http://www.mediainsight.org/PDFs/Millennials/Millennials%20Report%20FINAL.pdf (last visited Nov. 30, 2015); *see also* Perlberg, Steven, "*TV's Looming Threat: 'Cord Nevers'*" at http://www.wsj.com/articles/tvs-looming-threat-cord-nevers-1444151008 (last visited Nov. 30, 2015).

other content.[28] The NPRM ignores that leveraging the value of traditional networks, localism, and the live, linear signal has become more difficult, not less. Indeed, the entire NPRM seems premised on the Commission's acceptance of unsupported MVPD arguments of extreme disadvantage while ignoring its own data that MVPDs still have equal and considerable leverage in retransmission consent negotiations.

Finally, the NPRM scarcely acknowledges that the sole finding of a violation under the totality of the circumstances test to date was by a MVPD, and not a broadcast station.[29] Of the other good faith complaints subject to Commission action, the Commission found no violation of the duty to negotiate retransmission consent in good faith.[30] Given the paucity of actionable complaints submitted over the past 15 years, it is clear that both MVPDs and broadcast stations understand the actions required of them to effect good faith negotiations and these parties routinely engage in such good faith negotiations notwithstanding the significant change that has affected both industries in the intervening period.

C. Rate Disagreements Do Not Mean There is a Market Failure.

The totality of the circumstances test is intended to encourage both parties to present bona fide proposals on the material terms of the agreement. However, and contrary to popular MVPD opinion, it does not require that broadcasters offer rate proposals that do not reflect the fair market value that a broadcast signal brings to a MVPD's programming offering or that broadcasters must

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[28] *See* Stelter, Brian, *As TV Rating and Profits Fall, Networks Face a Cliffhanger*, New York Times, May 12, 2013, http://www.nytimes.com/2013/05/13/business/media/tv-networks-face-falling-ratings-and-new-rivals.html?_r=0 (last visited Nov. 30, 2015).

[29] *See e.g.,* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933 (MB 2007).

[30] *See ACC Licensee, Inc. v. Shentel Telecommunications Company*, Memorandum Opinion and Order, 27 FCC Rcd 7584 (MB 2012); *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (MB 2007); *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (CSB 2001).

agree on all terms demanded by MVPDs. Nor is disagreement over the rates, terms and conditions indicative of a lack of good faith.[31]

Since 2005, when Nexstar first sought a cash payment from cable MVPDs for retransmission of its stations' signals, MVPDs have been complaining both about the mere fact of having to pay for retransmission consent and the "outrageous" rates broadcasters "demand" for such carriage rights. In 2005 Nexstar sought a mere penny a day from MVPDs for retransmission of its stations (and ultimately settled for agreements providing for much less). Even today broadcast stations are lucky to receive an average of 5 cents per day (e.g., $1.50 per month) as MVPDs continue to fight tooth and nail to avoid paying fair market value for a broadcast station signal that includes not only the MVPD declared "must see" programming but also the local programming broadcasters are committed to providing, and do provide, to their communities.

Despite the Commission's finding that it is "reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming," MVPDs have spent the last near decade running to the Commission and Congress alleging broadcasters demand retransmission fees that dramatically burden consumers, claiming mass "percentage" increases, while ignoring that even today retransmission fees represent just 3% of MVPDs' total programming costs and 2% of their revenues.[32] MVPDs do not tell the Commission or Congress that the economics of their programming expenses are primarily driven

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[31] *See ACC Licensee, Inc. v. Shentel Telecommunications Company*, Memorandum Opinion and Order, 27 FCC Rcd 7584, 7587.

[32] *See* Haney, Hance, *Repeal Satellite Television Law*, Mar. 4, 2014, http://techliberation.com/2014/03/04/repeal-satellite-television-law/ (last visited on Nov. 30, 2015). It is much more dramatic for a MVPD to claim a broadcaster is demanding a 200% increase than to say a broadcaster is seeking an increase from 25 cents a month to 50 cents a month, or that the increase from 25 to 50 cents is gradual over a three year period.

by cable and sports networks.[33] For example, while MVPDs tout 8600% increases in retransmission consent fees across the broadcast industry in the aggregate (starting from almost no retransmission consent fees in 2005), the reality is that by 2017, local TV stations will receive an average of $1.32 per subscriber per month while ESPN will receive $7.72 per subscriber per month and TNT $1.92.[34] This is consistent with historical 2009 data showing that MVPDs paid an average of $2.08 per subscriber to retransmit one of the top four cable networks in 2009, but only $0.14 per subscriber to retransmit one of the Big 4 broadcast networks.[35]

In fact, most of the complaints filed by MVPDs with the Commission to date were not filed because of genuine violations of good faith or serious failures to adhere to negotiation standards, but because a MVPD was determined to turn its economic/financial frustration into an appeal to generate "evidence" of a dispute, when it is in actuality nothing more than a disagreement over the appropriate valuation of the broadcaster's signal(s).[36] The Commission rightly has concluded that "[s]uch disagreements, without more….are not indicative of a lack of good faith. Even with good faith, impasse is possible."[37] However unpopular with MVPDs, the Commission's position on rates is consistent with the legislative history of Section 325(b) and the intent of Congress, which created a free "marketplace for the disposition of the rights to retransmit broadcast signals" where

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33 *See* TVFreedom.org at http://www.tvfreedom.org/wp-content/uploads/2015/04/Cable-vs-RSN-vs-broadcast-fees1.pdf (last visited Nov. 30, 2015) (in 2015 retransmission fees are projected to be only 11.4% of the total basic cable network and regional sports network programming fees).

34 *See* SNL Kagan Press Release, "*SNL Kagan Releases Updated Industry Retransmission Fee Projections*" Oct. 27, 2014, http://www.prweb.com/releases/2014/10/prweb12279018.htm (last visited Nov. 30, 2015).

35 *NAB 2011 Comments* at 43.

36 Most good faith complaints filed are not acted upon by the Commission because an agreement is reached by the parties prior to Commission action.

37 *See e.g., In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.: Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiation Retransmission Consent Rights in Good Faith, Memorandum Opinion and Order,* CSR-7058-C (January 4, 2007) at ¶24.

government would not "dictate the outcome of the ensuing marketplace negotiations."[38] That is, broadcast stations are statutorily permitted to enter into agreements "containing different terms and conditions including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[39]

D. The Previously Adopted (Below) Proposals Remain Consistent With A Competitive Marketplace.

In implementing the good faith provisions in 2000, the Commission stated the following are presumptively consistent with competitive marketplace considerations:

1. Proposals for compensation above that agreed to with other MVPDs in the same market;

2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;

3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;

4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;

5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and

6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.[40]

The NPRM asks whether "in light of the changes that have occurred in the video programming marketplace" (solely from MVPD perspective) this list should be modified. In

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38 *NAB 2011 Comments* at 18.

39 47 U.S.C. 325(b)(3(C). As Senator Tauzin explained, "as long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill." 145 Cong. Rec. H 2320 (daily ed. April 27, 1999) (colloquy between Representatives Tauzin and Dingell).

40 *Good Faith Order*, 15 FCC Rcd at 5469-70.

considering this question, the Commission must remember the retransmission consent marketplace does not involve cookie cutter participants negotiating for identical rights and obligations. Rather, it involves single market broadcasters, broadcasters with stations in multiple markets, vertically integrated broadcasters (e.g., ABC, NBC, CBS, FOX, Scripps Network, etc.), single market MVPDs, MVPDs that operate in 190 or more markets, MVPDs that own programming channels and MVPDs that do not. Further not every MVPD system has identical (unlimited) distribution capacity. An agreement between a broadcaster who operates in one market and a MVPD who operates an older, limited capacity system will include many fewer terms than a negotiation between ABC and Comcast.

Moreover, elimination or modification of the foregoing provisions ultimately means injecting the Commission into the substantive negotiating process to establish the terms for which it deems negotiation of which are no longer pro-competitive presumptions. For example, elimination of the presumption that proposals for compensation above that agreed with other broadcasters in the same market (e.g., a broadcaster must offer the same rate to all MVPDs in a market and the resulting corollary that MVPDs must offer identical compensation to all broadcasters in the same market) translates into the Commission eliminating rate discussions from retransmission consent negotiations regardless of when the agreements are negotiated and regardless of whether the broadcaster and MVPD operate in other markets together. In fact, elimination of this provision will entirely abrogate the Congressional determination that variations in rates within a market are presumptively competitive.

Similarly, elimination of the provision that proposals for compensation that are different from the compensation offered by other broadcasters in the same market essentially means that the Commission is sanctioning the joint negotiation of not just two broadcast stations in a market (which both the Commission and Congress have prohibited) but of every broadcast station in the market.[41] Moreover, will it be the Commission who designates which broadcaster and which MVPD are the entities designated to negotiate the rates for all broadcasters and all MPVDs in the market? Will the parties engage in rock-paper-scissors to make the determination of who negotiates for each group? What if a broadcaster or MVPD negotiates a rate that another in-market broadcaster or MVPD has no interest in accepting – that leaves the disagreeing entity with the sole recourse of not entering into one or more agreements for that market (which ultimately harms both the broadcaster and the MVPDs).

In fact, eliminating any of the foregoing provisions (other than provision 6) means the parties will no longer be able to negotiate those provisions and entirely eviscerates much of the parties' negotiations.

The NPRM then asks whether there are practices or proposals that standing alone do not violate the good faith negotiating requirement but that in combination with other factors may violate the test.[42] This question entirely misses the point – the totality of the circumstances test is not about whether a specific action in and of itself is a violation of the obligation for MVPDs and broadcasters to negotiate in good faith but whether the applicable party, based on all of the facts and circumstances of a negotiation, has evidenced a bona fide and sincere desire to reach an agreement.

[41] Nexstar is further unsure how the Commission will square the elimination of the competitive presumption that proposals for compensation that are different from the compensation offered by others with the presumption that agreements to fix prices are anticompetitive.

[42] NPRM at ¶11.

II. ADOPTING SPECIFIC ACTIONS AS EVIDENCE OF BAD FAITH UNDERMINES THE TOTALITY OF THE CIRCUMSTANCES TEST.

When the Commission implemented the good faith negotiation requirements it, with deliberate and careful thought, elected to identify specific actions that are *per se* not good faith, while leaving the totality of the circumstances test non-specific to permit the Commission to consider all aspects of a negotiation. That is, by design, the Commission elected to adopt a rule that lets it review a negotiation as a whole in a flexible manner to consider whether a negotiating party's conduct, in totality, is "sufficiently outrageous," or that shows the "absence of a sincere desire to reach an agreement."[43] By now asking whether "there are certain practices that [it] should consider to be evidence of bad faith in evaluating the totality of the circumstances" and "what specific negotiation practices . . . should be considered evidence of bad faith under the totality of the circumstances test" the Commission appears to be abandoning its flexibility to consider the negotiation as a whole in favor of predetermining evidence without considering an action within the context of the entire negotiation.[44] However, if specific practices are deemed "evidence of bad faith" under a totality of the circumstances review, regardless of the circumstances, the Commission is essentially converting the totality of the circumstances test into the *per se* test.

Notwithstanding the manifest confusion in adopting presumptive violations into the totality of the circumstances test will cause, the Commission inquires whether it is "evidence of bad faith" for:

- broadcasters to block online access by viewers to a station's signal during a negotiation impasse, including blocking an MVPD's online subscribers who do not subscribe to the MVPD's cable or satellite video service;

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43 *Good Faith Order* at 5458.

44 NPRM at ¶8.

- broadcasters to relinquish to third parties (e.g., networks) their rights to grant retransmission consent and/or whether networks may have any involvement in negotiations;
- broadcasters to give any third party the right to approve its retransmission consent agreement;
- broadcasters jointly negotiating with, or entrusting negotiations to, any non-commonly owned entity regardless of geographic market;
- broadcasters instance on “bundling” broadcast signals with (a) other cable or satellite programming services, (b) the signals of other co-owned stations, or (c) the station’s multicast channels;
- broadcasters insistence that an agreement expire just prior to a “marquee” sports or entertainment event;
- an in-market station blocking importation by an MVPD of a duplicating distant station if the local station is not retransmitted by the MVPD;
- broadcaster prohibition of the use of lawful devices and functionalities by an MVPD or the MVPD’s subscribers;
- broadcaster demand for payment for signals viewed by an MVPD’s subscribers over the air or through the MVPD’s internet offering, but not viewed by means of the MVPD’s traditional video service;
- broadcaster or MVPD refusal to provide “information substantiating reasons for positions taken” when requested by the other;
- broadcaster or MVPD engaging in conduct designed to delay negotiations;
- broadcaster or MVPD demands based on most favored nations provisions;
- broadcaster insistence on channel position or tier placement as a condition of carriage;
- broadcaster failure to submit a written proposal to MVPDs at least 90 days before the existing agreement expires;
- broadcaster prohibition of disclosure of the rates, terms, or conditions of an agreement to a court of competent jurisdiction or to a state or federal government entity in connection with a formal complaint or administrative proceeding;
- broadcaster discrimination in rates among MVPDs in the same market absent a showing of a direct and legitimate economic benefit of the rate difference;
- a broadcaster or MVPD’s failure to negotiate terms and conditions based on “actual local market conditions”; and
- a party to manufacture a retransmission consent dispute in the hope of encouraging government intervention.

Nexstar notes that only five (5) of the foregoing are reflected as applicable to MVPDs notwithstanding that many of the foregoing are as equally applicable to MVPD conduct as to broadcaster conduct (e.g. giving third parties the right to approve retransmission consent agreements; jointly negotiating with, or entrusting negotiations to, any non-commonly owned entity regardless of geographic market; insisting an agreement expire just prior to a “marquee” sports or entertainment event; refusal to allow subscriber access to, or use of, lawful devices and functionalities; demands to place a broadcasters' signals on a discriminatory channel position or tier as a condition of carriage; failure to respond to timely negotiate before the existing agreement expires; prohibition of disclosure of the rates, terms, or conditions of an agreement to a court of competent jurisdiction or to a state or federal government entity in connection with a formal complaint or administrative proceeding;[45] discrimination in rates among broadcasters in the same market absent a showing of a direct and legitimate economic benefit of the rate difference). For example, Nexstar has experienced the following in its negotiations over the last 12-18 months: MVPD demands that Nexstar grant the MVPD rights it simply does not have available to grant; joint negotiations by one MVPD on behalf of another; negotiations with the same consultant or same attorney for multiple MVPDs at the same time (which consultants do not have authority to bind the MVPD for whom they are negotiating); blocking of legal broadcast functionalities (e.g., interactivity), and MVPDs ignoring Nexstar's early outreach and waiting to the last minute to begin negotiations among others.[46]

Although, as Nexstar explains below, the Commission should not adopt any of the foregoing as evidence of bad faith, in the event the Commission determines to proceed in such manner, the Commission must apply the "evidence" equally to both MVPDs and broadcasters and not just broadcasters alone.

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[45] If in fact broadcasters are demanding confidentiality provisions that prevent disclosure of agreements in administrative proceedings, how then have Comcast, Charter, Time Warner, DirecTV and AT&T been able to provide copies of their agreements to the Department of Justice and Commission in connection with administrative review of their merger applications?

[46] Ironically, since the Commission's 2014 adoption of the MVPD lobbied-for order prohibiting joint negotiation, Nexstar has been requested to conduct joint negotiations for itself and another in-market broadcasters by numerous MPVDs (including both MVPDs who directly lobbied for the change and MVPDs represented by the American Cable Association).

A. Online Access[47]

The Commission questions whether it is evidence of bad faith for broadcasters to block online access by viewers to a station's signal during a negotiation impasse, including blocking an MVPD's online subscribers who do not subscribe to the MVPD's cable or satellite video service. Online access is a complicated and highly technical aspect of distribution affected by the fact that the content contained in any one broadcast signal is owned by multiple parties. The owner of the broadcast signal is likely (but not always) the owner of the station's local news content, although such programming may contain content licensed from third parties (e.g., The Associate Press, CNN, the station's network, sports leagues, or other third parties). Network programming is owned by the network with which the station is affiliated and syndicated programming is owned by the licensor of such programming. Each of these entities has the sole right to control when, where and how the content may be viewed and each of these entities sets such rights within the scope of its agreements with the creators, producers, actors involved in the production of such content. The Commission has no legal or regulatory authority to supersede the content owner's ability to determine whether, when or how to make content available online, let alone third parties even further removed from Commission jurisdiction.[48] Further, the Commission must not take any action that would cause a broadcaster to violate the copyright rights of any content owner.

[47] The comments below apply equally to the Commission's question of whether it is bad faith for either party to prohibit lawful functionality. In general any broadcaster prohibition with respect to a "lawful function" is a requirement a content owner imposes with respect to permitting a broadcaster to allow MVPD distribution of its content. Conversely, while complaining of broadcaster prohibitions, MVPDs have refused and continue to reject allowing their subscribers to engage in lawful interactive engagement with broadcaster content.

[48] *See* Opposition of the National Association of Broadcasters to Petition for Rulemaking, *In the Matter of Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, MB RM-11728, at 4-5 (filed Sept. 29, 2014).

With respect to the Commission's concerns about consumers who subscribe to a MVPD's broadband service (but not its video services) who lose access to a broadcaster's online programming during an impasse, as a first step the Commission needs to instruct MVPDs to identify to broadcasters those broadband subscribers who are not also video subscribers. For example, if Time Warner is in a dispute with ABC with respect to its retransmission of ABC's stations in New York and Dallas, but not with respect to retransmission of the ABC affiliated stations in Peoria or Dothan, Time Warner should be able to identify the Peoria and Dothan subscribers so that ABC may permit them to continue to have online access.[49] Time Warner should be equally cable of producing a verifiable list of broadband only subscribers in New York and Dallas. To the extent a MVPD cannot provide a broadcaster with this information, this is a MVPD problem to solve not a reason to adopt a rule stating that blocking online access is evidence of bad faith without careful consideration of the specific facts of the actual parties' negotiation.

Although the Commission asks outside of its "specific evidence" review how a MVPD's demand for online distribution rights, or a broadcaster's refusal to grant those rights, be treated under the "totality of the circumstances" test, a MVPD demanding rights a broadcaster does not have to give should be considered *per se* bad faith.[50]

In the past three years, Nexstar has not had a single negotiation (other than with a few remaining analog only cable systems) where the MVPD has not requested, or in numerous cases demanded, that Nexstar grant such MVPD the right to distribute its stations broadcast signals, and

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[49] In the context of examining this question the Commission asks if causing consumers harm to enhance negotiating leverage should be pre-determined as evidence of bad faith. This question poses a slippery slope for the Commission as it must first define what "consumer harm" means and then establish how it will determine the party responsible for causing such harm all outside of the actual unique facts of a specific negotiation.

[50] The Commission's question assumes broadcasters have these rights to give and are simply refusing to grant MVPDs online distribution rights because they somehow believe it is in a broadcaster's interest to not make its signal as widely available as possible.

the content contained therein, online. However, as Nexstar has repeatedly explained it simply does not have such rights from its third-party content owners (and therefore, no rights under the Copyright Act) to grant the demanded distribution rights. Nonetheless, nearly every top ten MVPD Nexstar has negotiated with has asserted that Nexstar must negotiate substantive terms for online distribution now before Nexstar even knows what granting such rights will entail.

In addition, these MVPDs frequently assert that Nexstar is the only broadcaster who is refusing to engage in the premature negotiation of these rights. However, as Nexstar has learned from its own general discussions with other broadcasters (and contrary to MVPD claims), the vast majority of broadcasters have taken Nexstar's position on waiting to negotiate such rights when it has such rights, while those few who have chosen to negotiate early have either done so under duress or in exchange for a specific concession from the MVPD.[51]

B. Third Party Involvement

The right to grant or withhold retransmission consent is personal to the broadcast station and Nexstar is not aware of any network that retains a network right to approve an affiliate's retransmission consent agreement. However, the broadcast station must have consent, including a copyright grant, from its content licensors to distribute such content to MVPDs for MVPD distribution of such content to subscribers. Accordingly, there is a symbiotic relationship between the broadcast station and its content owners for distribution of the content contained in a broadcast signal via MVPDs; and it remains the content owner's discretion to set the terms and conditions pursuant to which a broadcaster may consent to distribution of the licensor's content via the

[51] To the extent the networks have granted online distribution rights for their owned and operated stations, they have not yet granted their affiliates the right to grant MVPDs the ability to distribute the network content contained in the station's signal via any method other than simultaneously with the live, linear broadcast or to any device other than television receivers. Nexstar submits that this proceeding is not the place for the Commission to interfere with network-affiliate practices.

MVPD's system.[52] Therefore, even though content owners are not directly involved in retransmission negotiations, a broadcaster is wholly within its rights to not breach its agreements with its content providers when negotiating retransmission consent rights, and the Commission has no authority to mandate a broadcaster breach a third party agreement simply to appease MVPD demands.

With respect the practice of jointly negotiating with, or entrusting negotiations to, any non-commonly owned entity regardless of geographic market, MVPDs are much guiltier of this than broadcasters. Time Warner Cable has for years negotiated on behalf of, and included, Bright House Networks in its agreements. Beyond that, in Nexstar's 2014 negotiations, one attorney negotiated on behalf of over half of the systems in the state of Iowa, another attorney negotiated on behalf of numerous Wisconsin systems, three lawyers at the same law firm negotiated for multiple MVPDs serving numerous markets across the Midwest, and the same consultant (not an attorney) negotiated for a dozen different systems. In addition, the National Cable Television Cooperative frequently negotiates with broadcasters on behalf of its members. And currently, Nexstar is negotiating with two separate large MVPDs both of whom are represented by the same individual attorney.[53]

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[52] To the extent MVPDs demand to take content owner participation out of retransmission consent negotiations, the alternative would be for MVPDs to negotiate with the broadcast station for the right to retransmit the station signal and with the content owner for the right to retransmit that owner's content contained in the signal. Elimination of the compulsory copyright is something that must be done by the Copyright Office, not the Commission.

[53] Nexstar learned this fact by accident (by noting identical language in both agreements and raising the matter with one of the MVPDs) and questions how the Commission would enforce any regulation when such attorney or other third party provides consulting in the background.

C. Bundling

Nexstar finds it extremely hypocritical that MVPDs argue that broadcasters must "unbundle" the programming a MVPD is "forced" to purchase because the price of MVPD service and the number of bundled networks consumers are forced to buy, have gone up in direct response to increased programming costs. If the Commission is truly concerned about "bundled" programming increasing consumer costs it should first require that MVPDs unbundle their consumer offerings such that non-sports subscribers are not required to pay for the ESPN suite and the regional sports network suite; or those who do not have children and do not wish to subscribe to Disney's or Nickelodeon's channels need not do so. Nexstar further questions whether requiring broadcasters to make unbundled offers to reduce subscriber costs is all that meaningful when Viacom, Discovery, National Geographic, A&E and numerous other cable channel providers are permitted to offer all of their channels in one bundle.

Nexstar also does not understand how bundling of broadcast and non-broadcast programming violate antitrust law. To the extent MVPDs complain about bundling (whether for non-broadcast channels, multicast channels, co-owned stations or otherwise) simply stating that is not good faith is not sufficient. MVPDs must be required to explain how these actions sustain a monopoly, fix prices, foreclose competition or otherwise are not bona fide, good faith proposals. Finally, Nexstar observes that regulations requiring broadcasters to unbundle programming would run afoul of Congressional intent. In passing Section 325(b), Congress anticipated that broadcasters would negotiate for "the right to program an additional channel on a cable system" as a form of compensation.[54] Therefore, limiting parties' programming/carriage options is wholly

[54] *NAB Opposition* at 15.

inconsistent with Congress' intent to create a marketplace where *the parties* negotiate terms to substitute a marketplace where the Commission dictates terms.

With respect to the "bundling" of co-owned stations where a MVPD operates in more than one DMA and a broadcaster owns a station in more than one DMA, preventing MVPDs or broadcasters from negotiating for all systems or stations owned by such entity leads to the absurd position that the MVPD and the broadcaster must negotiate individual separate agreements for each station/DMA. Even more absurd is the concept that both the MVPD and broadcaster must engage a different person to negotiate each separate agreement.[55] For example, requiring Nexstar to negotiate 66 separate agreements with DirecTV[56] (either with both parties engaging 66 separate representatives or even the same individuals negotiating for both parties 66 different times) would be highly inefficient and generate inconsistencies among such agreements that may result in one party unintentionally breaching an agreement. Making it evidence of bad faith negotiations for a station owner to negotiate for all of its stations retransmitted by the same MVPD all at once is entirely irrational in today's environment where retransmission consent agreements include complex and sophisticated terms.

The same arguments apply equally for multicast programming contained within a station's signal. Moreover, prohibiting broadcasters from negotiating for carriage of their multicast programming at the time the broadcaster negotiates for another portion of the station's signal may harm the public interest. For example, numerous stations carry the BounceTV Network, a network primarily aimed at African-Americans, on their digital multicast channels. Bounce is viewed by more than 85 million homes across 90 markets and ratings for Bounce have skyrocketed since its

[55] When making this argument the MVPDs conveniently leave out the obligation that *they* be required to hold separate negotiations using different negotiating parties for each market.

[56] DirecTV does not serve two of Nexstar's markets.

launch.[57] If broadcasters are not permitted to negotiate for the inclusion of multicast channels as a part of a MVPD's carriage of a station's signal, then multicast channels such as Bounce would not reach viewers who subscribe to MVPD services. Multicast channels provide value to subscribers and carriage serves the public interest.

Each MVPD and each broadcaster should be permitted to determine what "fees" work best for them, whether the fees include cash, multicast carriage, channel placement or any other tangible or intangible benefit. There is simply no reason for the Commission to establish a one size fits all marketplace, especially since the marketplace is not made up of identical participants.

D. Agreement Expiration Dates

The Commission questions whether it is inconsistent with marketplace considerations to discontinue carriage of stations just before marquee events. Nexstar notes that the expiration dates for vast majority of its agreements are linked to the outdated requirement that broadcasters make an election between retransmission consent every three years for a term that covers the period January 1 (first year) through December 31 (third year). Since the vast majority of its agreements are in sync with the election cycle and expire at year end of the third year, this undeniably means that most of its agreements expire just in time for the major college football bowl games. To move the expiration date of these agreements to January 31 would mean that they would then expire just prior to the Super Bowl. Moving the expiration date back to November 30 may result in the unavailability of marquee Christmas programming and does nothing to ensure that an agreement is reached prior to December 31. Nexstar's agreements that do not expire at year's end may or may not expire just before a "marquee" event.

[57] *See* http://www.bouncetv.com/news/ (last visited Nov. 30, 2015); *Bounce TV Catches BET in Viewership*, *PR* Wire at http://www.prnewswire.com/news-releases/bounce-tv-catches-bet-in-viewership-300121315.html (last visited Nov. 30, 2015).

Nonetheless, in all events, agreement expiration dates are established at the beginning of an agreement and all parties are well aware of the expiration date. In addition, although Nexstar cannot speak for other broadcasters, it has upon numerous occasions granted extensions of time to complete negotiation when it and the MVPD are reasonably close to finalizing an agreement regardless of the approach of a marquee event in order to prevent viewers from the loss of such event. Conversely, Nexstar has noted that MVPDs seek extensions only when there is high profile programming to be lost (i.e., College Bowl games, the Super Bowl, the Academy Awards); frequently informing broadcasters that, notwithstanding the broadcaster's ready agreement to an extension, the MVPD will not continue to carry a station because the agreement has expired and there is no high-profile programming involved. Further, if an impasse has been reached (even if a month prior to a marquee event), until a new agreement is reached, the MVPD may not retransmit the station regardless of whether a marquee event occurs during the impasse (and the Commission has no authority to order such retransmission).

If the Commission determines to inject itself into this area, it will need to provide specific guidance to both broadcasters and MVPDs on how many days in advance of a marquee event an agreement may terminate, when after the marquee event an agreement may terminate, and what qualifies as a marquee event. Further by establishing "expiration safe harbors" the Commission may create extended impasses. For example, in early August 2013 (which would presumably be a safe, marqueeless time to terminate an agreement) Time Warner and CBS reached an impasse and it was not until the start of the NFL season nearly a month later that the parties finally reached an agreement. Although Nexstar was not privy to that negotiation, Nexstar wonders if the impasse would have lasted as long if Time Warner had sufficient impetus to resolve it before the start of the NFL season.

E. Most Favored Nations Provisions

Nexstar has no opinion on whether most favored nations provisions are evidence of bad faith. However, the Commission's determination in this area must be applicable to broadcaster MFN provisions and MVPD MFN provisions equally.

F. Tier and Channel Provisions

The Commission asks whether it should interject itself into the negotiating process to deem tier and channel placement terms as off limit for negotiation between a broadcaster and a MVPD. If broadcasters and MVPDs are not permitted to negotiate for these terms, does the Commission intend to substitute its judgment and establish what tiers broadcast stations must be carried on and/or what channel positions such that every broadcast station is carried on specific tiers and specific channels? If not, how does the Commission intend that the parties determine these terms, for surely the Commission is not proposing matters of this import be limited to MVPD whim?

G. Rate Matters

Although the Commission only asks whether it is evidence of bad faith for a broadcaster to discriminate in rates among MVPDs in the same market absent a showing of a direct and legitimate economic benefit of the rate difference, if the Commission intends to examine this issue it must also address the question of whether it is bad faith for a MVPD to discriminate in rates among broadcasters in the same market absent a showing of a direct and legitimate economic of the rate difference. The Commission also must equally consider whether it is evidence of bad faith for MVPDs (and not just broadcast stations) to fail to negotiate terms and conditions based on "actual local market conditions." In addition, to implement either of these actions as evidence of bad faith, the Commission must determine now what constitutes a direct and legitimate economic benefit of a rate difference and what does not, what "actual local market conditions" means (now and in the future), as well as what rate discrimination actually means and what constitutes competitive marketplace considerations and what does not – regardless of any facts that may affect the Commission's analysis in the future.

For example, the Commission must explain why it is not discriminatory for a large MVPD serving multiple markets (or every market) to exercise its bargaining power to obtain better rates than a MVPD that operates only in a single market, but it is discriminatory for a broadcaster to exercise its bargaining power to obtain better rates. The Commission must also provide the authority on which it rests its decision to set aside the Congressional finding that a broadcast station's entry into retransmission consent agreements with different terms for different MVPDs, including different pricing terms, is wholly acceptable if the different terms are based on competitive marketplace considerations, as well as the Commission's previous determination that negotiators do not have an obligation to ascertain objective competitive marketplace factors on which they must base their offers and it is the aggregate negotiation market through which the relative benefits and costs to the broadcaster and MVPD are established.[58]

The Commission must consider that rate discrimination is only actually discriminatory if one company is treated worse than another for arbitrary or unlawful reasons. Nondiscriminatory treatment does not require every company to be treated identically so long as differences are based on objective business criteria. Bargaining power (based on the entity's size and market reach) is a legitimate marketplace consideration and no amount of "discrimination" claims can alter the basic fact that price disparities between MPVDs serving the same market that are based on the relative size and value of the MVPD are not in and of themselves discriminatory or otherwise violations of the good faith negotiating requirements. If it were, MVPDs would be hard pressed

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[58] *Good Faith Order* at 5467. *See supra* fn. 39.

to explain why it is not discriminatory to pay ESPN $7.72 per subscriber and a broadcast station $1.00 per subscriber when nearly every broadcast station provides higher ratings than ESPN.

In addition to the basic complaint of discrimination disadvantage, MVPDs have routinely and repeatedly argued that the existing retransmission consent market needs to be reformed so that no MVPD be required to pay more to a broadcaster than any other MVPD. Curiously MVPDs do not seek to offer broadcasters equivalent protection. That is, they do not seek Commission imposition of a requirement that a CW or MyNetwork (or independent or religious station) be paid the same "non-discriminatory" fee as the ABC, NBC or CBS affiliate. Nor do MVPDs seek a regulation that requires every MVPD to pay every broadcaster (who carries the exact same network programming), whether owned and operated by the network, owned by a group or a single market station owner, the same fee despite the disparity in each party's bargaining power. Indeed, Nexstar suspects that MVPDs would object strenuously if the Commission proposed granting such protections to broadcasters.

Rate disparities are not a lack of good faith bargaining, and Congress specifically acknowledged this fact when it stated that "it shall not be a failure to negotiate in good faith if television the broadcast station enters into retransmission consent agreements containing different terms and conditions, including pricing terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace decisions."[59] STELAR did not grant the Commission authority to determine otherwise.

H. Distant Signals

Nexstar is puzzled by the MVPD complaint that broadcasters prevent MVPDs from importing an out-of-market signal in cases where the parties have reached impasse. If there is no

[59] 47 U.S.C. §325(b)(3)(C)(ii).

longer an agreement in place, how is the in-market station preventing a MVPD from engaging in any activity unrelated to the in-market station's retransmission? Moreover, STELAR prohibits "a television broadcast station from limiting the ability of a [MVPD] to carry into the local market . . . a television signal that has been deemed significantly viewed . . . or any other television signal such distributor is authorized to carry."[60] Accordingly, MPVDs are fully able to import significantly-viewed or authorized stations into a local market, subject only to the consent of the licensee of the distant station.

As ATVA succinctly explains, this "request" is not a demand for the right to import out-of-market stations, but a demand to prohibit broadcast stations from exercising network non-duplication and syndicated exclusivity rights to permit MVPDs to have access to the missing network programming.[61] That is, it is not MVPD desire to serve local viewers with lost local programming, but a desire to increase their negotiating leverage by bringing in network programming from an out-of-market station. Providing MVPDs with the right to import a distant station in order to secure the network programming likely will have the counter effect of depriving in-market viewers of the in-market station's local news and programming for a longer period, which disserves the public interest.

Nexstar has first-hand experience with the many unforeseen repercussions of a MVPD importing a distant signal solely for the purposes of obtaining access to network programming. In both 2010 and 2012 Time Warner imported Nexstar's stations in distant markets in areas outside of where those stations were significantly-viewed. In 2012, Time Warner imported Nexstar's

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[60] STELAR §103(b).

[61] ATVA Ex Parte Letter at 4. MVPDs do not have this option available when negotiating for non-broadcast programming (e.g., it cannot acquire *Gold Rush* or *Alaskan Bush People* from another source if it is at impasse with Discovery), yet they argue the need to have this right for *Minority Report* or *Grimm*.

northeastern Pennsylvania station (WBRE-TV) into the Greensboro-High Point-Winston-Salem (over 400 miles away) and Orlando (over 900 miles away) Designated Market Areas ("DMA") and its northwest New York station (WROC-TV) into the Louisville DMA (over 500 miles away) during its retransmission consent dispute with Hearst Television, Inc. without any notice to Nexstar. Time Warner's justification for these extremely distant importations was preventing consumer loss of popular network programming during its impasse with Hearst. This Time Warner action resulted in two "Eyewitness News" stations broadcasting in Orlando, which caused direct harm to the Orlando "Eyewitness News" station by diminution of its value as that news franchise in the Orlando market. It also caused attorneys advertising in compliance with Pennsylvania State Bar requirements to violate both Pennsylvania and Florida bar requirements. Time Warner also violated an unrelated Orlando station's syndicated exclusivity rights by broadcasting the relevant programming on Nexstar's station.

Time Warner's conduct also harmed Nexstar's relationships with numerous advertisers including state-regulated entities (as noted above) and local franchisees of national corporations (*e.g.*, car dealerships, restaurants) which are contractually restricted from airing their television commercials outside of their local markets. For example, one such advertiser whose Rochester-local franchisees had different (and lower) price points from the Louisville-local franchisees threatened to withdraw all advertising on Nexstar's stations because Nexstar could not assure it that the Rochester ads would not be broadcast outside of the Rochester market. In addition, Nexstar received numerous calls and emails from viewers in these distant cities confused as to why they were receiving the distant Nexstar station and alarmed that they were seeing emergency alerts without realizing those alerts were not applicable to them.

I. Negotiating Tactics

Several of the Commission's specific proposed indicia of evidence of bad faith relate to how the parties negotiate, including whether the parties must provide "information substantiating reasons for positions taken;" whether a party is engaging in conduct designed to delay negotiations (an undefined concept); when to initiate negotiations;[62] and manufacturing a dispute in the hope of encouraging government intervention.

As the Commission examines whether parties must provide substantiating information upon request it will need to explain why scant weeks ago it stated that it was not a violation of the good faith rules for DirecTV to refuse to provide the complaining party with data showing the rates it pays to other broadcasters.[63] And as previously stated, this obligation must be reciprocal – that is MVPDs must provide broadcasters with substantiation of the terms a broadcaster requests substantiation for (and not just rates). Further, will it be sufficient to substantiate terms with respect to a single market, or must each party substantiate the terms of every agreement entered into by such party? Nexstar expects that in the event the Commission adopts a substantiation requirement parties will move to agreements that do not deviate in terms, which in turn will lead to MVPD complaints regarding broadcasters' refusals to negotiate different terms.

With respect to delaying conduct, the Commission will need to identify specific conduct that is, at all times, impermissibly delaying. For example, Nexstar provided draft agreements to its largest 2015 renewing MVPDs in mid-August or early September. One provided a counterproposal approximately 6 weeks later, others provided initial responses within about two

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[62] Nexstar is not aware of any rule that prohibits MVPDs from initiating negotiations.

[63] *See Northwest Broadcasting, L.P., Broadcasting Licenses, Limited Partnership, Mountain Licenses, L.P., Stainless Broadcasting, L.P., Eagle Creek Broadcasting of Laredo, LLC, Bristlecone Broadcasting, LLC and Blackhawk Broadcasting, LLC*, MB Docket 15-151, DA 15-1271, Nov. 6, 2015

months, and one still has not provided a counterproposal. Was it a delaying tactic for these MVPDs to wait six weeks or more to present a counter draft? Is unreasonable for Nexstar to take two weeks (or one week or three weeks) to respond when the MVPD finally offered a counter? Is it reasonable for a MVPD to assume a broadcaster is doing nothing but waiting for the MVPD to respond and therefore can drop everything to instantly respond to a proposal? Is it delaying conduct for one party to take more than a day to respond to a question asked by the other party? Is it permissible for a party to take six weeks to respond if the agreement does not expire for 90 days, but not to take even a week when the parties are down to 30 days or less? If the Commission imposes an obligation on broadcasters to initiate negotiations at least 90 days prior to an agreement expiration is it a delay for a MVPD not to respond with a counterproposal within a week?

With respect to other forms of "delay," the American Cable Association recommends the Commission consider as delaying tactics unreasonable bargaining demands (what is unreasonable and who gets to make that determination), unilateral changes in mandatory subjects of bargaining, withdrawal of already agreed upon provisions and arbitrary scheduling of meetings.[64] Nexstar is aware of a single MVPD that has engaged in all of the foregoing conduct. However, unless the Commission intends to wade into the weeds in establishing permissible and impermissible conduct for each of the foregoing, Nexstar believes these are exactly the type of items that are best addressed under a flexible totality of the circumstances test.

The impressiveness of the totality of the circumstances test is its flexibility to consider each negotiation on the specific facts presented. It may consider any and all of the foregoing within the context of the failure of an individual negotiation, whether a request for placement on a specific tier or channel or a request to carry major network affiliated stream and the multicast stream

[64] American Cable Association July 24, 2015 Ex Parte Letter.

contained within the same signal; whether one party has delayed negotiations by failing to timely offer a counterproposal or changing a counterproposal after offering it; or whether a party has taken or failed to take an action in the specific context of that single negotiation. By incorporating specific standards into the test, the Commission ultimately is finding that the unique circumstances of complicated negotiations are no longer relevant and that the Commission now intends to dictate a vast array of terms (which Nexstar anticipates will require multiple proceedings taking many years to establish).

III. CONCLUSION.

The Communications Act does not contemplate an intrusive role for the Commission with regard to retransmission consent and nothing in Section 103 of STELAR directing the Commission to review of its totality of the circumstances test modifies that mandate. Nor does Section 103 require the Commission to inject itself into the negotiation of retransmission consent. Nonetheless, the NPRM does exactly that, with questions and proposals weighing heavily on the side of MVPD preferences. In fact, many of the Commission's proposals of as evidence of bad faith eviscerate the Congressional mandate that the Commission not dictate the outcome of marketplace negotiations through adoption of requirements that will mandate the Commission establish the specific terms or specific dispute mechanisms. Nexstar is certain this is not the outcome Congress expects from its directive to review the totality of the circumstances test.

WHEREFORE, for the foregoing reasons, Nexstar respectfully requests that the Commission not amend or change the "totality of the circumstances" test leaving the inherent flexibility of the test available to the Commission for determining whether parties' negotiation retransmission consent agreements are acting in good faith.

Respectfully submitted,

Nexstar Broadcasting, Inc.

By: /s/ Elizabeth Ryder
Elizabeth Ryder
Senior Vice President & General Counsel
545 E. John Carpenter Freeway
Suite 700
Irving, TX 75062

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